

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	
)	
Petition for Declaratory Ruling of All About the)	CG Docket No. 02-278
Message, LLC)	
)	
To: The Commission)	

**FURTHER COMMENTS OF DAVID FRANKEL IN RESPONSE TO DA 17-368 RE:
PETITION FOR DECLARATORY RULING OF
ALL ABOUT THE MESSAGE, LLC**

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BACKGROUND

On 25-April 2017, I filed initial comments (“My Earlier Comments”) on this matter. With this filing, I augment those comments to provide:

- I. Additional rationale for finding that the Direct-to-Voicemail application promoted by the Petitioner violates the TCPA.
- II. Other considerations related to the DTV application.
- III. A request that the FCC issue a definitive Declaratory Ruling on the matter of Direct-to-Voicemail applications generally

I. The Direct-to-Voicemail Application violates TCPA for Additional Reasons

In 47 U.S. Code § 227 (a), the term “telephone solicitation” is defined as “the initiation of a telephone call or *message* for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person’s prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.” (emphasis added)

This definition makes clear that Congress intended for the Commission to regulate solicitations that take the form of “messages” even to the extent that they are distinct from a “telephone call.” So if one were to deem the Direct-to-Voicemail application to be something other than a telephone call, it most certainly is still a “message” and subject to FCC jurisdiction.

In that vein, the FCC has already promulgated regulations with respect to mobile Short Message Service (SMS, or text messaging). And in fact when the Direct-to-Voicemail service deposits a message in an unsuspecting subscriber’s voicemailbox, it often triggers an SMS to that

subscriber. The SMS may be a simple “message waiting indication” letting the subscriber know that they should connect to the voicemail platform to retrieve the new message. Or, many providers now offer “voicemail to text” services that will transcribe, using automated or human technology, a voicemail message into text, which is then delivered by SMS to the subscriber’s handset.

Providers may impose a quota or a per-message charge for these services, so despite the petitioner’s claims to the contrary, the subscriber may incur a charge directly resulting from the direct-to-voicemail application (and in addition to charges for accessing the voicemail platform to retrieve the message).

Further, most voicemail platforms impose a limit on the number of messages that the system will store. Messages deposited into a subscriber’s mailbox take up space, potentially causing the subscriber to reach their limit and resulting in loss of *desired* messages.

Separately, I argued in My Earlier Comments (on page 10 in my “fourth” point), that by calling the voicemail access number, the Direct-to-Voicemail service was calling a “wireless number” which is a violation of Do-Not-Call. One might, alternatively, argue that the call is to the voicemail platform belonging to the mobile provider and claim that is not a “wireless number.” (I could not find a definition of “wireless number” in the TCPA, but I explained in My Earlier Comments that I believe these numbers to indeed be “wireless numbers.”)

Nonetheless, if we follow this path, we find that the Direct-to-Voicemail application is in violation of 47 U.S. Code § 227 (b)(1)(D) which makes it “unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States –“ “to use an automatic telephone dialing system in such a way that two or more telephone lines

of a multi-line business are engaged simultaneously.” (47 CFR 64.1200 (a)(5) contains similar language.)

Petitioner states in their Exhibit A (and repeats in Exhibit C), “Our proprietary M7.7RVM software creates a landline to landline session directly to the telephone company’s voicemail service.” Thus, it is clear that their Direct-to-Voicemail service delivers messages by placing telephone calls (using telephone lines) to the “telephone company.” Said telephone company – typically the mobile operator, such as T-Mobile or Sprint or AT&T or Verizon or a host of other smaller providers – is clearly a business.

On their web page at <https://straticsnetworks.com/stratics-networks-vs-the-competitors/> (viewed 9-May at 5:46 PM PDT), Stratics (the petitioner’s vendor) boasts: “Massive Capacity – Send Out 10,000 RVMs Per Minute”. The only way that’s possible is to make multiple simultaneous calls to the same voicemail platform – “in such a way that two or more lines of a multi-line business are engaged simultaneously.” And indeed, in the material in the petition, at page 8 of Exhibit D, Stratics highlights that they have “80,000 phone lines” – plenty of connectivity to tie up lots of lines going into numerous voicemail platforms at once. A truly efficient way to violate TCPA over and over.

II. Other Considerations Related to the Direct-to-Voicemail Application

When Congress enacted (and revised) the TPCA, they had no way to know what sorts of annoying services might be invented in the future. They did the best job they could to make sure that the FCC had sufficient authority to mitigate intrusions that almost nobody wants. In fact, it isn’t just authority, it’s a *mandate*, and the FCC has an *obligation* to fulfill it.

Most consumers don't even understand how these Direct-to-Voicemail messages get into their inbox. They do not understand that they are being surreptitiously deposited by clever marketers. They think that they've missed a call and scurry to retrieve the message.

I have provided numerous different ways that the FCC could and should find these intrusions in violation of the TCPA and other rules. The petitioner and their brethren should get a free pass on none of this. The FCC should give standing to BOTH the end consumer and the telephone companies that are suffering from these violations.

The Direct-to-Voicemail application is growing in popularity. We identified from a simple web search these sites that tout its availability:

- www.straticsnetworks.com/Ringless/VoicemailDrops
- www.dialers.com/ringless/voicemail
- www.slybroadcast.com/
- www.dontcallprotection.com/ringless-voicemail
- www.dialercentral.com
- www.messagizer.com/ringless-voice-broadcast/
- www.voicelogic.com/voicecasting.php

This needs to be stopped now. Many of these sites tout the “legality” of this approach and they need to be disabused of that notion.

III. The FCC Should Rule on the Instant Petition and the Direct-to-Voicemail Application

Generally

Like robocalls generally, the menace of Direct-to-Voicemail is growing, not abating. This is in part due to lax enforcement. This is not the first time that this has come up. In this same docket, the FCC released DA 14-1269 on 3 September 2014, on essentially the same topic in response to an earlier request for Declaratory Ruling filed by VoApps, Inc.

To my knowledge, the Commission received few comments and never acted on the petition. It was ultimately withdrawn.

Just because consumers aren't inundating you with complaints doesn't mean they are happy. As noted, many don't even know how these messages got into their mailboxes.

This time, the Commission needs to act. Even if you don't receive comments beyond my own, and even if the petitioner were to withdraw, I request that this time you rule definitively and in a timely fashion.

It is simply not fair that millions of consumers be subjected to endless irritations, even if minor. Death by a thousand cuts.

Respectfully submitted,

DATED: 9 May 2017

/s/ David Frankel

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